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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 529

WILLIAM IRWIN DENNY, ET AL. (Rodney Browne Starr, Plaintiff No. 4.), *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Rodney Browne Starr, Plaintiff in the Court below, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on July 12, 1963.

OPINION BELOW

The opinion of the Court of Claims (R. 62-66) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1963 (R. 62). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether a former enlisted man of the Regular United States Navy, who served as a commissioned officer in World War I, prior to November 12, 1918, and subsequently retired as a chief petty officer, and was advanced on the retired list to his war-time commissioned rank, pursuant to the Act of May 7, 1932, c. 171, 47 Stat. 150, is a commissioned officer on the retired list, and entitled upon his release from active duty after recall to active duty during World War II, with service as a temporary commissioned officer, to have his retired pay computed under the provisions of Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368.

STATUTES INVOLVED

The Act of May 7, 1932, c. 171, 47 Stat. 150, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all warrant officers and enlisted men who served in the Army, Navy, Marine Corps, or Coast Guard of the United States during the World War or the Spanish-American War, and whose service during such war was creditable, and who have been or hereafter may be retired according to law, shall on the date of approval of this Act or upon retirement in the case of those now on the active lists of the services named herein, be advanced in rank on the retired list to the highest commissioned, warrant,

or enlisted grade held by them during such war: *Provided*, That nothing in this Act shall entitle any of the personnel described herein, while on active duty, to any other rank than that in which they were serving at the time of retirement: *And provided further*, That no increase in active or retired pay or allowances shall result from the passage of this Act.

Section 8(a) of the Act of February 21, 1946, c. 34, 60 Stat. 26, 28, amending § 10 of the Temporary Promotions Act of July 24, 1941, c. 310, 55 Stat. 603, 605, provides in material part as follows:

Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of war or national emergency. *Upon the termination* of their temporary status such *personnel* on the active list of the Regular Navy and Marine Corps shall assume their permanent status and those *of the retired list* and of the respective Reserve Components, including the Fleet Reserve and Fleet Marine Corps Reserve, *shall have, when returned to an inactive status*, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

(b)(1) Personnel of the retired list *returned* to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed

at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

(c) Personnel of the classes described above who have been retired or released from active duty prior to February 21, 1946, shall be entitled to the benefits of this section *from the date of retirement or release from active duty,* as the case may be.

(d) Personnel accorded higher rank pursuant to this section shall, if subsequently assigned active duty, be recalled to active duty in the grades, ranks or ratings, with which they were retired or returned to an inactive status unless under other provisions of law they are entitled to higher grades, ranks, or ratings. (Emphasis added.)

Paragraph 4, § 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368, provides as follows:

The retired pay of any officer of any of the services mentioned in the title of the Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

STATEMENT

The petitioner, a former enlisted man of the United States Navy, served as an enlisted man and a commissioned officer during World War I and prior to November 12, 1918; he subsequently was transferred to the Fleet Reserve; and after his retirement as a chief petty officer, he was, on February 19, 1934, advanced on the retired list to the rank of Lieutenant, junior grade, as provided by the Act of May 7, 1932, *supra;* on July 14, 1941, he was recalled to active duty as a chief petty

officer and served in that rate until June 22, 1942, when he received a temporary appointment as Lieutenant, junior grade, as authorized by the Temporary Promotions Act of 1941, *supra*; he thereafter received successive temporary promotions, attaining the rank of Lieutenant Commander; on August 30, 1946, he was released from active duty and returned to an inactive status on the retired list. After his release from active duty he was advanced on the retired list to the rank of Lieutenant Commander, and has received retired pay based upon the rank of a Lieutenant Commander credited with his years of active service. In his action in the Court below he sought to recover the difference in the retired pay received by him, and retired pay based upon 75 per cent of the pay he was in receipt of at the time of his release from active duty, as provided by Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*.

The Court below held that the plaintiff was not entitled to have his pay computed under the provisions of Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*, because he was not "re-retired" as an officer, but instead had reverted to an enlisted status on the retired list, and then been advanced to commissioned officer rank.

REASONS FOR GRANTING WRIT

1. The Court below has so far departed from the accepted and well-defined principles of statutory construction as to necessitate the exercise of this Court's jurisdiction to obviate a patent injustice to the petitioner and others similarly situated.

The Court below has repeatedly held that commissioned officers retired from military service prior to

World War II who were recalled to active duty during that war, were, upon release from active duty "re-retired", and entitled to retired pay as provided by Paragraph 4 of § 15 of the Pay Readjustment Act of 1942, *supra*. *Carroll* v. *United States*, 117 C. Cls. 53; *Danielson* v. *United States*, 121 C. Cls. 533; *Sherfey* v. *United States*, 141 C. Cls. 307, *cert. den.* 357 U.S. 926. It, however, held that petitioner, upon his release from active duty had not been returned to the retired list in the commissioned rank which Congress had provided he held under the provisions of the Act of May 7, 1932, *supra*, but instead had "reverted" to a non-existent status of enlisted man on the retired list, and had subsequently been advanced on the retired list to his highest commissioned rank. The construction the Court below gave the Act of May 7, 1932, *supra*, effectively destroyed the status which the Congress had specifically provided that the petitioner should have on the retired list.

2. Even if it be assumed *arguendo* that the Court below correctly held that the plaintiff retained a permanent status as an enlisted man on the retired list, despite the provisions of the Act of May 7, 1932, *supra*, the construction it placed on the Act of February 21, 1946, *supra*, not only fails to give effect to the plain language of the statute, but also disregards completely its legislative history, which clearly shows that the Congress did not intend to discriminate between enlisted men advance to temporary commissioned rank, and officers advanced to higher temporary commissioned rank. During the hearings before the Senate Committee on Naval Affairs on S. 1405, 79th Cong., 1st Sess., which ultimately was enacted as the Act of February 21, 1946, the Chief of Naval Personnel, Admiral Denfield,

made the following statement, at p. 23, regarding the changes incorporated in former Section 10 of the 1941 Act by the amendatory Act:

> "[p. 23] *Admiral Denfield.* * * * the bill authorizes enlisted men who served in commissioned grades during the war to have their highest rank or rating held during the war upon their transfer to the Fleet Reserve or on release to inactive duty if already in the Fleet Reserve; this same highest rank or rating is provided for Reserve officers on release to inactive duty *and to retired officers and men on their return to inactive status*, and to officers and men of the Regular Navy when subsequently retired. Retired pay is based on the highest rank or rating held." (Emphasis supplied.)

Admiral Herbert G. Hopwood appeared before the Senate Naval Affairs Committee on November 6, 1945, and, at pp. 2-4, said:

> "[p. 2] *Admiral Hopwood.* At the first hearings before this committee it appeared to be the sense of the committee that we consider the overall problem of retirement of personnel including the retirement of enlisted men who served in higher commissioned grades during the war.
>
> "*The Chairman.* Yes.
>
> "*Admiral Hopwood. And thereupon we rewrote the bill to include in like manner throughout, retirement provisions which authorized enlisted personnel when they retire to retire with the highest rank held during the war and with retired pay based on that rank.*
>
> "*The Chairman. The same as officers?*
>
> "*Admiral Hopwood.* Yes, sir.
>
> "*The Chairman. The same as regular officers?*
>
> "*Admiral Hopwood. This would be a new feature; yes, sir.* (Emphasis added.)

* * * *

"[p. 4] *The Chairman.* Now our objective is to, as near as possible, treat enlisted men to the same as officers?

"*Admiral Hopwood.* Yes, sir.

"*The Chairman.* How is that accomplished in these provisions?

"*Admiral Hopwood.* We think that is accomplished under the provisions of the committee reprint No. 2 that we have here.

"*The Chairman.* What section?

"*Admiral Hopwood.* Section 8 of the bill, sir."

See also in this connection, the discussion of the amended Section 10 appearing in Senate Report No. 701, 79th Cong., 1st Sess., page 7, and debate in the Senate, 91 Cong. Rec. 10919, 10920.

It, of course, is elementary that an act should be construed in a manner to effect the intent of the legislature as disclosed by the legislative background of the Act. Cf. *United States* v. *Dickerson*, 310 U.S. 544, 562; *Galvan* v. *Press*, 347 U.S. 522, 526-528; and *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, where, at pp. 112, 113, this Court said:

> "The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion."

3. The decision of the Court below affects the status and retired pay of more than 100 former retired enlisted men of the Regular United States Navy who served their country as officers during World War I, who were advanced on the retired list to commissioned

status under the provisions of the Act of May 7, 1932, *supra*, and who were subsequently recalled to active duty and received temporary appointments to commissioned rank in the Regular Navy, and, upon release from active duty, were returned to the retired list or should have been returned to the retired list of the Regular Navy with the highest rank in which they had satisfactorily served as determined by the Secretary of the Navy. As the Court below has sole jurisdiction of this type of action, petition to this Court for grant of writ of certiorari is the only method by which review of the decision of the Court below can be obtained.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for grant of certiorari should be granted.

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